Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MICHAEL D. ANDREAS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Due Process Clause and this Court's decision in *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), permit a conviction under Section 1 of the Sherman Act for a practice that has never been condemned as per se unlawful, without requiring the jury to find an intent to restrain trade.

2. Whether the defendant should have the burden of proving that particular sales were not affected by the charged conspiracy and therefore should not be included in the affected "volume of commerce" under U.S.S.G. § 2R1.1(b)(2)(G).

3. Whether a Court of Appeals exceeds its limited appellate function under the clearly erroneous standard when it reverses the District Court's plausible finding on the factual issue of a defendant's role in the offense, substitutes its own finding of fact, and instructs the District Court to impose a particular sentence.

LIST OF PARTIES

Petitioner, Michael D. Andreas, a natural person, and Respondent, the United States of America, were parties in the Court of Appeals for the Seventh Circuit. Terrance S. Wilson also was a party in the Court of Appeals; he is filing a separate Petition for *Certiorari* to review the Court of Appeals' judgment. Mark E. Whitacre and Kazutoshi Yamada were parties in the District Court, but not the Court of Appeals. Whitacre's conviction and sentence became final when he did not appeal the District Court's judgment; he is not an interested party as to this Petition. Yamada has not been tried and also is not an interested party as to this Petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on June 26, 2000, and adhered to on denial of rehearing and rehearing *en banc* on July 27, 2000.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 216 F.3d 645 and is reproduced at App. 1a. The order of the Court of Appeals denying rehearing and rehearing *en banc* is unreported and is reproduced at App. 149a. The memorandum and order of the District Court imposing sentence is unreported and is reproduced at App. 63a. The memorandum and order of the District Court ruling on the application of "volume of commerce" under U.S.S.G. § 2R1.1 is unreported and reproduced at App. 93a. The memorandum opinion and order denying Petitioner's post-trial motions is reported at 39 F. Supp. 2d 1048 and reproduced at App. 100a. The memorandum and order of the District Court denying Petitioner's motion for judgment of acquittal is reported at 23 F. Supp. 2d 863 and is reproduced at App. 142a.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on June 26, 2000. Its order denying rehearing and rehearing *en banc* was entered on July 27, 2000. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent portions of the Fifth Amendment to the Constitution of the United States, 15 U.S.C. § 1, 18 U.S.C. § 3742, and U.S.S.G. §§ 2R1.1 and 3B1.1 are reproduced at App. 151a.

STATEMENT OF THE CASE

THE DISTRICT COURT PROCEEDINGS. On December 3, 1996, Petitioner, Michael D. Andreas ("Andreas"), was indicted for conspiracy to restrain trade in violation of 15 U.S.C. § 1. The Indictment alleged that the conspiracy had two goals. The first was price-fixing. The second was allocating sales volumes, an arrangement that the government conceded had never been adjudicated illegal under either a per se or Rule of Reason analysis. At the end of trial, the District Court instructed the jury that it could convict Andreas of either an agreement to fix prices or an agreement to allocate sales volumes. On September 17, 1998, after almost two months of trial, the jury returned a general verdict of guilty, making it impossible to determine of which offense the jury convicted Andreas.

The Intent Instruction. The District Court recognized the necessity of instructing the jury to find both intent elements as mandated by *United States v. United States Gypsum Co.*, 438 U.S. 422, 444 n.20 (1978). In its written opinion denying Andreas' motion for judgment of acquittal, the District Court ruled that the per se standard applied to the sales volume allocation because it was done in furtherance of price-fixing. App. 143a. In other words, the District Court concluded that the Indictment alleged only one conspiracy with two connected goals, the first being price-fixing and the second being sales volume allocation with an intent to help accomplish price-fixing. The District Court ruled that the sales volume allocation "constitutes a per se violation because it was committed in furtherance of the alleged price-fixing and therefore became inextricably intertwined." *Id.* Consequently, the District Court denied Andreas' motion for judgment of acquittal, and held that the sales volume allocation issue would be decided by the jury because there was "arguably" sufficient evidence "that the defendants set the sales volume allocation in order to facilitate the price-

fixing scheme [alleged in the Indictment]." App. 146a. Apparently recognizing the requirements of *Gypsum*, the District Court stressed that the jury "should, and will, be permitted to draw its own conclusions as to whether the sales volume [sic] was in furtherance of the price-fixing scheme." *Id.*

Despite this apparent recognition that the sales volume allocation became a per se offense only if done with an intent to fix prices, the District Court refused Andreas' proposed jury instruction to that effect. Instead, the District Court arrogated the function of determining Andreas' intent even though intent is a fundamental fact question to be determined by the jury in a criminal antitrust case.

Although the District Court did instruct the jury that it must find that Andreas intended to enter into an agreement, it removed from the jury the second critical issue of intent, intent to effectuate the object of the conspiracy. The government contended that the sales volume allocation was intended to effectuate a price-fixing agreement, yet the District Court simply assumed this critical issue of fact, rather than sending it to the jury. The District Court instructed the jury that it could convict Andreas for allocating sales volume *simpliciter*, even if that sales volume allocation were not intended to facilitate or accomplish price-fixing. Indeed, the District Court's jury charge left the jury free to convict Andreas even if it found him innocent of price-fixing, the predicate act upon which the District Court based its per se ruling:

> The conspiracy charged in the indictment includes two different types of conduct, an agreement to fix prices and an agreement to allocate sales volumes. It is not necessary for the Government to prove that the conspiracy charged in the indictment includes both types of conduct. It would be sufficient if the Government proves beyond a reasonable doubt a conspiracy to

> commit *one* of the types of conduct charged in the indictment. . . . (emphasis in original).

The District Court then unsuccessfully tried to repair the damage done by this instruction in responding to Andreas' post-trial motions. The District Court suggested, for the first time, that the sales volume allocation was functionally equivalent to a different practice, an output restriction, and used that rationale to defend its denial of Andreas' motion for judgment of acquittal. App. 113a. The District Court held in its December 30, 1998 order that "there is little doubt that the sales volume allocation was, by design, an output restriction calculated to manipulate price without directly setting the price." *Id.*

Sentencing. The District Court adopted the reasoning of *United States v. Hayter Oil Co.*, 51 F.3d 1265 (6th Cir. 1995), and held that in determining Andreas' sentence, the volume of commerce affected by the conspiracy would be calculated "based on *all* domestic dry lysine sales made during the scope of the conspiracy." App. 93a (emphasis in original). Accordingly, the District Court found that the conspiracy existed from June 23, 1992 until June 27, 1995, and that the amount of domestic dry lysine sales during that time was approximately $168 million, resulting in a seven level increase in Andreas' sentence.

The District Court rejected the government's claim that Andreas was an organizer or leader and that his offense level should be increased by four levels. Based upon an extensive review of the record, the District Court held that Andreas bore no greater culpability than his co-conspirators. Indeed, in the District Court's July 13, 1999 sentencing order, it discussed in detail the evidence that supported its conclusion, including the fact that there existed conflicting evidence on various issues. The District Court had attentively observed the evidence, including the tapes, documents, and the credibility of witnesses during the two month trial. The District Court also received lengthy sentencing memoranda

from both Andreas and the government, all of which it carefully considered and discussed in ruling that Andreas would not receive a four level increase for role in the offense.

THE COURT OF APPEALS. Andreas timely appealed his conviction to the Seventh Circuit and the government filed a cross-appeal on Andreas' role in the offense. On June 26, 2000, the Seventh Circuit issued an opinion affirming Andreas' conviction and remanding the case to the District Court with instructions to increase Andreas' offense level by four levels.

The Intent Issue. In affirming Andreas' conviction, the Seventh Circuit acknowledged that a sales volume allocation had not been previously addressed in the case law, yet it held a sales volume allocation to be per se illegal because in the Seventh Circuit's view, the sales volume allocation restricted output. The Seventh Circuit recognized that the sales volume allocation was not a conventional or prototypical output restriction, and that supply was not reduced below demand. App. 34a-39a. Notwithstanding this fact, it ruled that the sales volume allocation was per se illegal because, in its view, "the volume division among the lysine competitors restricted competition over those sales that would lower the commodity price." App. 37a.

Sentencing Issues. The Seventh Circuit affirmed the District Court's ruling on volume of commerce, even though it rejected the District Court's approach that included in the "volume of commerce" calculation "all sales made within the scope of the conspiracy." App. 54a. The Seventh Circuit also reversed the District Court's finding that Andreas was neither an organizer nor a leader subject to a four level sentencing increase. App. 61a-62a. In so doing, the Seventh Circuit rejected the District Court's factual findings, which were based on substantial credible evidence. Instead, the Seventh Circuit made its own factual findings and reversed

and remanded with instructions to give Andreas a four level increase in his sentence.

REASONS FOR GRANTING THE WRIT

The decision below conflicts with this Court's decision in *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), and the due process principles reflected therein. *Gypsum* makes clear that the issue of intent "cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent . . ." *Id.* at 435. That is precisely what the trial court did in this case. After first explicitly ruling that the government would need to prove that Andreas agreed to allocate sales volume with an intent to facilitate price-fixing, the District Court shifted gears and allowed the jury to convict Andreas for entering a sales volume allocation agreement without regard to any intended effect on prices. This result cannot be squared with *Gypsum*. In *Gypsum*, this Court reversed a conviction premised on an instruction that allowed the jury to convict competitors for exchanging price information without regard to any intended effect on prices. In both cases, the trial court committed a serious due process violation by taking the issue of intent away from the jury in a criminal antitrust trial.

In ratifying this error, the Seventh Circuit committed an even more fundamental violation of the Due Process Clause. It effectively dismissed this error as harmless by treating the sales volume allocation as a per se violation that could support a criminal conviction without evidence of any intent to affect prices. The Seventh Circuit reached this conclusion based on a supposed equivalence between output restrictions and sales volume allocations, even though no prior case, civil or criminal, had treated a sales volume allocation agreement as unlawful per se, and even though the sales volume allocation agreement in this case did not reduce output. By ratifying the *Gypsum* error, the decision below raises the serious due process issues this Court avoided by reversing the

conviction in *Gypsum*. *See id.* at 446 n.22. The decision below opens the way for the imposition of strict criminal liability for business arrangements never previously held unlawful. The whole notion of imposing criminal liability for violations of the broadly-worded provisions of the Sherman Act is in tension with this Court's firm rejection of common-law crimes. *See, e.g., United States v. Hudson and Goodwin,* 11 U.S. (7 Cranch) 32 (1812). Only insistence on proof of intent to affect prices or a well-established pattern of judicial treatment of a practice as per se unlawful keeps this "tension" from breaking out into open conflict. By upholding a criminal conviction unsupported by a finding of intent for a practice never declared unlawful, the decision below creates a due process violation of the first order.

Two sentencing issues also merit this Court's attention. *First*, the decision below created a clear three-way split of authority among the circuits as to the proper calculation of the affected "volume of commerce" for sentencing purposes under U.S.S.G. § 2R1.1(b)(2)(G). To date, the Second, Sixth, and Seventh Circuits have considered the issue and each has resolved it differently. As a result, antitrust defendants stand to receive substantially different criminal sentences depending on the circuit in which they are tried. Allowing this circuit split to subsist will deprive defendants of clear notice as to the ramifications of their conduct and undermine the interest in uniform sentences that animates the Sentencing Guidelines.

Second, the decision below represents a particularly egregious example of appellate factfinding and resentencing on appeal. Although this Court generally does not engage in error correction, the Seventh Circuit's invasion of the proper sphere of the District Court was so blatant that it merits either summary reversal or a grant of *certiorari* to reaffirm the deference owed to a sentencing court's factual determinations. After considering all the evidence, including the

credibility of several live witnesses, the District Court concluded that Andreas did not play a leading role in the offense. On appeal, the Seventh Circuit reversed this determination based on its own (mis)reading of the record. This decision interferes with sound judicial administration. It ignores the proper division of labor between trial and appellate courts. It creates a terrible incentive for litigants to lard their appellate briefs with rearguments of the facts in the hope that the appellate court will resentence. This Court should send a clear message that such appellate factfinding and resentencing is impermissible.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *GYPSUM* AND THE DUE PROCESS PRINCIPLES REFLECTED IN THAT DECISION

The decisions below merely assume that Andreas intended anticompetitive effects even though no prior case, under either a Rule of Reason or per se analysis, has confronted the economic consequences of a sales volume allocation agreement. By removing the issue of intent from the jury, contrary to this Court's holding in *Gypsum*, the courts below violated Andreas' due process rights by converting Section 1 of the Sherman Act into a strict liability statute, subjecting even good faith mistakes to criminal liability. Individuals are entitled to know when their actions may subject them to criminal liability, but under the decisions below businesspeople in the Seventh Circuit will proceed at their peril, for any agreement they make, even if such an agreement has never been adjudicated illegal, will expose them to criminal liability if a court determines after-the-fact that the conduct had anticompetitive consequences.

A. The Decision Below Conflicts with *Gypsum* by Taking the Issue of Intent Away from the Jury.

As this Court has recognized, unlike most criminal statutes, Section 1 of the Sherman Act does not "precisely identify the conduct which it proscribes." *Gypsum*, 438 U.S. at 438. Indeed, on its face, the broad language of Section 1 makes illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations. . . ." 15 U.S.C. § 1. Notwithstanding the breadth of this language, the Sherman Act was not intended to regulate "business practices regardless of the intent with which they were undertaken," but only those practices with intended anticompetitive consequences. *Gypsum*, 438 U.S. at 440-42. "The imposition of criminal liability on a corporate official . . . for engaging in such conduct which only after the fact is determined to violate the statute because of anticompetitive effects, without inquiring into the intent with which it was undertaken, holds out the distinct possibility of over deterrence. . . ." *Id.* at 441. Moreover, it has the potential to unconstitutionally penalize individuals for engaging in conduct where they did not intend anticompetitive consequences and where there was no notice to them that their conduct was likely to produce anticompetitive results. Antitrust issues are frequently complicated. They often involve fine distinctions between conduct that is perfectly legal because of its procompetitive economic effect, and conduct that is illegal because of its anticompetitive economic effect. Business-people should not have to be Ph.D. economists to gauge whether their activity is proscribed by the law; they should have fair warning that the steps they are about to take cross the line into illegal territory.

Because the Sherman Act does not proscribe illegal conduct with specificity, it has been left to the courts to determine what conduct is and is not illegal. Accordingly, in only limited circumstances is conduct presumed to be per se

illegal. Rather, in both civil and criminal antitrust cases the Rule of Reason is the "prevailing standard of analysis." *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977). "Per se rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive." *Id.* at 49-50. *See also California Dental Ass'n v. Federal Trade Comm'n*, 526 U.S. 756, 776-78 (1999).

The determination of whether conduct is manifestly anticompetitive is not left to guesswork, and the label of per se illegality is not to be applied by courts on the very first occasion that new conduct is examined. *See id.* at 781 (holding that "a less quick look was required for the initial assessment of the tendency of these . . . restrictions"). The per se rule may only be applied to a new category of restraints in limited circumstances, "once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it." *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (citation omitted). This principle requires that per se treatment may only be applied after Rule of Reason analysis has found that the practice in question "always or almost always tends to restrict competition or decrease output." *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723 (1988) (citation omitted). As the government has conceded, and as the Seventh Circuit agreed, a sales volume allocation has never been adjudicated illegal under any standard. App. 35a. The lack of a prior finding of anticompetitive effect did not deter the District Court, however, as it brushed aside the lack of precedent and the fact that this was the very first time that any court has confronted a sales volume allocation by expressing during oral argument the view that: "[w]ell, there has to be a starting point, doesn't there?" In so doing, the District Court created a presumption of criminal intent, speculating that Andreas intended this novel and untested arrangement to have anticompetitive effects, and it deprived Andreas of the right to have this issue determined by the jury.

A defendant in a criminal case possesses an undeniable "historical and constitutionally guaranteed right . . . to demand that the jury decide guilt or innocence on every issue, which includes application of the law to the facts." *United States v. Gaudin*, 515 U.S. 506, 513 (1995). As this Court emphasized in *Rose v. Clark*, 478 U.S. 570, 580-81 (1986), there is a requirement of jury determination of decisive facts in criminal cases, even when considering presumptions embraced by the trial court. Whether Andreas intended a sales volume allocation to have anticompetitive consequences was a question of fact that should have been submitted to a jury, not presumed. "However clear the proof may be, or however incontrovertible it may seem to the judge to be the inference of a criminal intention, the question of intent can never be ruled as a question of law. . . ." *Morissette v. United States*, 342 U.S. 246, 274 (1952) (citation omitted). This Court has held that this is no less true in a criminal antitrust case. In *Gypsum*, this Court held that "a defendant's state of mind or intent is an element of a criminal antitrust offense which must be established by evidence and inferences drawn therefrom and cannot be taken from the trier of fact . . . . " 438 U.S. at 435. This includes both the intent to agree and intent to effectuate the object of the conspiracy. *Id.* at 444 n.20.

Reduced to its essence, the District Court's order held that the sales volume allocation was per se illegal because it was in furtherance of one of two per se illegal practices: price-fixing or restricting output. Yet in instructing the jury, the District Court simply presumed that the sales volume allocation was done in furtherance of one of these two per se illegal practices. In so doing, the District Court improperly removed from the jury the issue of intent by refusing to instruct that the jury must find that Andreas intended the sales volume allocation to further price-fixing or to restrict output. *See Gypsum*, 438 U.S. at 435-36.

The predicate facts necessary to establish the District Court's presumption of intent and its application of the per se

rule were the sales volume allocation's intended facilitation of price-fixing or the limitation of output. A jury finding that the sales volume allocation was intended to or had the foreseeable effect of fixing prices or restricting output beyond a reasonable doubt was required to support the presumption of per se illegality used by the trial court. *See Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993). The District Court presumed that the intended effect of the sales volume allocation was to facilitate price-fixing. Moreover, it presumed that if the sales volume allocation had the effect of limiting the availability of lysine, then this was its intended result. These presumptions are contrary to this Court's holding in *Gypsum*, and the District Court's approach threatens to subject business-people to criminal liability for conduct that has never before been labeled illegal.

The District Court's rationale was similar to the jury instruction condemned by this Court in *Gypsum*, which stated:

> The law presumes that a person intends the necessary and natural consequences of his acts. Therefore, if the effect of the exchanges of pricing information was to raise, fix, maintain, and stabilize prices, then the parties to them are presumed, as a matter of law, to have intended that result.

438 U.S. at 430. The role the District Court presumed for the sales volume allocation here was similar to the role of the inter-seller price verification scrutinized in *Gypsum*. As in *Gypsum*, by taking from the jury the issue of intent to effectuate an illegal object of a conspiracy, whether the illegal goal was claimed to be price-fixing or restricting output, the District Court deprived Andreas of his constitutionally protected right to a jury trial.

B. The Decision Below Imposed Criminal Sanctions for Conduct Never Before Deemed Per Se Unlawful in Violation of Due Process Principles Repeatedly Recognized by this Court.

The Seventh Circuit's effort to correct the District Court's erroneous intent instruction not only failed to correct the error, but also created an even more serious due process violation. The Seventh Circuit treated conduct never before deemed a per se violation of the Sherman Act as criminal per se. This imposition of strict criminal liability for conduct marked illegal neither by statute nor case law violates the due process principles reflected in this Court's rejection of common law crimes, and this Court's teaching in *James v. United States*, 366 U.S. 213 (1961).

The Seventh Circuit attempted to cure the District Court's erroneous intent instruction by recasting the sales volume allocation agreement as an output restriction. The Seventh Circuit reasoned that if the sales volume allocation were construed as an output restriction, which courts traditionally have treated as a per se offense, then the District Court's failure to link the sales volume allocation to an intent to fix prices becomes harmless error. This maneuver fails as both a matter of fact and as a matter of law.

First, as a matter of fact, the evidence at trial demonstrated that this sales volume allocation did not have the effect of reducing output. More fundamentally, Andreas was denied any opportunity to explore the ramifications of the sales volume allocation agreement on output because the sales volume allocation as output restriction theory was not introduced into the case until after the close of evidence. Andreas was therefore subjected to a classic bait and switch: having mounted a defense to the government's sales volume allocation as incident to price-fixing theory, Andreas was then forced on appeal to defend against a sales volume allocation as output restriction. This post-trial substitution

denied Andreas a meaningful opportunity to present a defense.

The Seventh Circuit's effort to repair the District Court's erroneous intent instruction suffers an even more fundamental defect as a matter of law. By imposing strict criminal liability for conduct that no statute and no case law has ever deemed unlawful per se, the decision below violated Andreas' fundamental rights to fair notice and due process. This Court has long held that common law crimes violate a defendant's due process rights. In one of its earliest due process decisions, the Court condemned the imposition of criminal liability for actions not deemed unlawful by statute. *United States v. Hudson and Goodwin*, 11 U.S. (7 Cranch) 32 (1812). More broadly, this Court has emphasized on many occasions that an intent requirement mitigates the danger posed by an imprecise statute. *See, e.g., United States v. Ragen*, 314 U.S. 513, 523-24 (1942); *United States v. Gaudreau*, 860 F.2d 357, 360 (10th Cir. 1989) ("a scienter requirement may mitigate a criminal law's vagueness by ensuring that it punishes only those who are aware their conduct is unlawful") (collecting cases).

The Seventh Circuit, as well as other Courts of Appeals, have previously limited the holding in *Gypsum*. In *United States v. Brighton Building & Maintenance Co.*, 598 F.2d 1101, 1106 (7th Cir. 1979), the Seventh Circuit held that it did not "read *Gypsum* as indicating that once defendants are proved to have intentionally made an agreement which is unlawful Per se, there must be an instruction that the defendants cannot be convicted unless they are found to have intended to restrain trade or commerce." The Seventh Cireuit concluded that "the issue of intent was adequately submitted [ ] where the court instructed that, in order to convict it must be proved that defendants knowingly agreed or formed a combination or conspiracy for the purpose of rigging the bids, and intentionally assisted in its furtherance." *Id.* In *Brighton*

Building & Maintenance, the charge was bid-rigging, which had previously been announced in the case law as a per se violation of the Sherman Act. *See, e.g., United States v. Finis P. Ernest, Inc.*, 509 F.2d 1256 (7th Cir. 1975).

Here, however, the decisions below have further restricted the applicability of *Gypsum* and will result in the creation of strict liability crimes in those instances where a practice—however novel or unique, irrespective of whether it has ever been adjudicated illegal in prior cases, and notwithstanding the defendant's intent—is deemed by a court to have the effect of limiting output, or to have the potential to limit output. This Court rejected this result in *Gypsum*. *See* 438 U.S. at 436.

The sales volume allocation is not an arrangement that has previously been condemned by any court, unlike other arrangements that have been held to be per se illegal such as territorial, customer, and product allocations. These proscribed activities have common characteristics. All of them grant producers monopoly power with respect to the territories, customers, or products that are assigned to them. Division of territories, customers, and products restricts not only price competition, but all other competition, because there is only one producer serving each territory or customer, or providing each product. These are the anticompetitive features that prior cases have identified in those arrangements deemed to be per se illegal.

The sales volume allocation in this case had none of these features. The lysine competitors all sold the same product, they all sold in whatever geographic regions they desired, and there were no restrictions on the customers to whom the competitors could sell lysine. No previous case has addressed the unique features of a sales volume allocation agreement.

By instructing the jury that it could convict Andreas if it found he merely conspired to allocate sales volume, without requiring the jury to find intent to facilitate price-fixing or an

output limitation, the District Court violated the due process requirement that one is entitled to fair warning that conduct is illegal before he may be charged criminally for that conduct. *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939); *Bouie v. City of Columbia*, 378 U.S. 347, 350-51 (1964). Notice must be found either in a precise statute or, as in the case of antitrust crimes, in cases decided before the defendant engaged in the conduct in question.

The lack of any fair notice that a sales volume allocation is a per se offense also renders Section 1 unconstitutionally vague as applied here. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). Moreover, by charging the jury that Andreas could be convicted of agreeing to allocate sales volume without conspiring to fix prices or to limit output, the District Court retroactively enlarged the list of practices made criminal under Section 1 of the Sherman Act, adding an ex post facto unconstitutional feature. *Bouie*, 378 U.S. at 352.

Fair notice is especially important in Section 1 cases because "behavior proscribed by the [Sherman] Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct." *Gypsum*, 438 U.S. at 440-41. The law does not discourage proximity to the lines it draws. "[T]he very meaning of the line in the law is that you intentionally may go as close to it as you can . . ." *Superior Oil Co. v. Mississippi*, 280 U.S. 390, 395-96 (1930). Providing adequate notice of the line separating permissible from illegal conduct is especially important in antitrust cases where "procompetitive conduct lying close to the borderline of impermissible conduct might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment for even a good-faith error of judgment." *Gypsum*, 438 U.S. at 441.

Hallmarks of conduct that violates Section 1 of the Sherman Act include divisions of customers, territories, or

products. The sales volume allocation in this case contained none of these features. Moreover, there was no evidence of a cut-back in production, another hallmark of anticompetitive arrangements. Not a single witness at trial testified that the sales volume allocation was intended to limit the production of lysine. Indeed, one of the government's witnesses testified that there was no limitation of output, and the testimony of another government witness was that ADM may have been producing all that it could. There was no evidence of the production volumes of ADM's lysine competitors. Moreover, there was no evidence of lysine shortages anywhere in the world caused by the sales allocation, and there was no evidence that ADM or any of its competitors was stockpiling inventory.

Indeed, output and sales expanded under the alleged sales volume allocation. The evidence at trial was that each competitor was to sell more lysine in 1994 than in 1993 under the alleged allocation, and the competitors did sell more lysine: 24,800 tons more in 1994 than in 1993. Indeed, the Seventh Circuit's opinion recognized that this was not "a conventional illegal agreement to limit industry output." App. 36a. The Seventh Circuit's opinion also recognized that the sales volume allocation satisfied the world-wide demand for lysine and did not reduce supply below demand. App. 37a-38a. In other words, the sales volume allocation involved in this case was unlike the prototypical or conventional output restrictions that have been addressed and condemned by prior cases. Notwithstanding this fact, the Seventh Circuit affirmed Andreas' conviction, holding that the sales volume allocation agreement constituted an output restriction because the effect of the sales volume allocation "restricted competition over those sales that would lower the commodity price," and presuming that this was Andreas' intent. App. 37a.

It cannot be ignored that the evidence at trial showed Andreas repeatedly stating his intention that ADM employees

were not to violate the law. No price-fixing discussions occurred in Andreas' presence. Moreover, one of the FBI agents admitted at trial that he never instructed Whitacre, the government's informant, to tell Andreas about price-fixing. Yet Andreas was convicted of an antitrust violation without receiving notice that a sales volume allocation is a crime and without having the jury decide whether Andreas intended a sales volume allocation to have anticompetitive effects.

This case, therefore, presents a conviction for a judge-made crime. The jury was expressly allowed to convict if it found either one of two practices, global sales volume allocation or price-fixing. Only price-fixing has precedent ruling it to be a restraint of trade. This Court denounced a conviction in a case where prior precedent held the action on which it was based to be legal. The Court appears not to have decided a case where the absence of precedent as to the legality of the underlying conduct is challenged.

James v. United States, 366 U.S. 213 (1961), presented a charge of tax evasion, which like Sherman Act violations, requires proof of the element of intent. Uncertainty over the taxability of illegally obtained funds in *James* presented an intent issue, as does this case.

In *Commissioner v. Wilcox,* 327 U.S. 404 (1946), the Court had held that embezzled funds did not constitute taxable income in the year of the embezzlement. When an embezzled funds case again came before the Court in *James,* the Court overruled *Wilcox* and held that embezzled funds did constitute taxable income in the year of the embezzlement; the Court, however, overturned the defendant's tax evasion conviction for lack of willfulness because, at the time the funds went unreported, the statute still contained the "gloss" from *Wilcox. James,* 366 U.S. at 221-22 (plurality opinion). The Court was concerned that allowing a conviction to stand in the face of contrary precedent was comparable to a

forbidden judge-created crime. *See id.* at 224-25 (Black, J., concurring in part and dissenting in part).

Here, the government has conceded that no case can be found holding a global sales volume allocation to be a restraint of trade. The Seventh Circuit did not disagree, but held that such an allocation had the effect of an output restriction, and it allowed the conviction to stand. Constitutionally, the absence of any precedent warning that such a practice is illegal per se is as great an absence of notice, as great a violation of ex post facto prohibitions, and as much a judge-made crime as the conviction that *James* held could not stand.

Several concerns influenced the Court in *James*. Prominent among them was the concern that the conviction raised the spectre of "a criminal statute that is so ambiguous in scope that an interpretation of it brings about totally unexpected results, thereby subjecting people to penalties and punishments for conduct which they could not know was criminal under existing law, [thus raising] serious questions of unconstitutional vagueness." *Id.* at 224 (Black, J., concurring in part and dissenting in part).

That same concern is presented by Andreas' conviction.

II. THE DECISION BELOW ADDS TO A CLEAR THREE-WAY CONFLICT AMONG THE CIRCUITS ON THE PROPER CALCULATION OF THE "VOLUME OF COMMERCE" FOR SENTENCING PURPOSES

The Seventh Circuit created a clear conflict with the Courts of Appeals for the Second and Sixth Circuits as to the proper calculation of the "volume of commerce" under the Sentencing Guidelines. Three circuit courts have examined this issue, and each has resolved the issue differently. All three circuits apply different tests to determine whether sales during the period of the conspiracy were affected by the

conspiracy and should be included in the affected "volume of commerce" pursuant to U.S.S.G. § 2R1.1(b)(2)(G). This Court should grant this Petition and ensure that criminal defendants receive sentences that are uniform and correct.

The Sixth Circuit addressed the issue first in *United States v. Hayter Oil Co.*, 51 F.3d 1265, 1273-74 (6th Cir. 1995), and took what could be best described as an extreme pro-prosecution view. The Sixth Circuit imposes an irrebuttable presumption that all sales during the conspiracy period were affected by the conspiracy. Even if the defendant presents substantial evidence that a certain percentage of the sales were made through channels unaffected by the conspiracy, the Sixth Circuit sentences the defendant based on "all sales of the goods (here, gasoline) made by the defendant during the period of the conspiracy." *Id.* at 1274.

The Seventh Circuit in the decision below expressly rejected the Sixth Circuit's holding. Acknowledging that "*Hayter Oil* reflects a possible and not unreasonable reading of the Guidelines," it noted that "it is not the most natural one," and expressly rejected the Sixth Circuit rule. App. 57a ("like the Second Circuit, we disagree with the *Hayter Oil* holding" to the extent it creates an irrebuttable presumption); *see also id.* ("Although a permissible reading, we do not adopt *Hayter Oil* . . . ."). Instead, the Seventh Circuit adopted a moderate pro-prosecution view that treats all sales during the conspiracy period as presumptively included in the affected volume of commerce. The Seventh Circuit clearly shifts the burden to the defendant to prove that certain sales were unaffected, but unlike the Sixth Circuit, the Seventh Circuit makes the presumption rebuttable. App. 58a-59a. This is the same position advocated by Judge Newman in his concurrence in *United States v. SKW Metals & Alloys, Inc.*,

195 F.3d 83 (2d Cir. 1999). *Id.* (citing Judge Newman's concurrence).[1]

The Second Circuit majority disagreed with both the Sixth Circuit and the Judge Newman-cum-Seventh Circuit position. Instead, the Second Circuit employs a moderately pro-defendant view and keeps the burden on the government to show that sales during the conspiracy were affected by the conspiracy. In determining whether the conspiracy affected the sales, the Second Circuit applies a multifactor test which "lightens" the government's burden. However, as the Second Circuit expressly noted, "this lightening of the government's burden does not excuse altogether the government's need to prove that the prices charged were 'affected by' the conspiracy." *SKW*, 195 F.3d at 91. In a particularly important passage in light of the evidence at trial in this case, the Second Circuit specified that "if during the course of the conspiracy there were intervals when the illegal agreement was ineffectual and had no effect or influence on prices, then sales in those intervals are not 'affected by' the illegal agreement, and should be excluded from the volume of commerce calculation." *Id.* Judge Newman disagreed with the majority's analysis and wrote separately to criticize the majority's multi-factor test and its placement of the burden on the government. As noted, the Seventh Circuit adopted Judge Newman's view.

The remaining available interpretation, which could be viewed as the most pro-defendant, would place the burden squarely on the government to prove the volume of commerce without the help of any presumptions—rebuttable or irrebuttable—or any "lightening" of the government's

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[1] Although it acknowledged that the District Court had applied the *Hayter Oil* test that it expressly rejected, *see* App. 54a, the Seventh Circuit did not bother to remand for the application of the proper test, *see* App. 60a. This is just part and parcel of the Seventh Circuit's usurpation of the District Court's sentencing function, as discussed *infra*.

burden. Although no Court of Appeals has adopted this rule (as noted there have been three circuit court opinions and four interpretations of the guideline), it is the rule adopted by the District Court in *SKW* and the construction urged unsuccessfully by Petitioner in the courts below.

This Court should grant this Petition and review the split of authority among the circuits. The circuits are badly split, and the split has deepened, rather than receded, as additional courts have analyzed the issue. Part of the difficulty is that the critical phrase "is not defined in the Guidelines, is not used elsewhere in the Guidelines, is *sui generis* to the Guidelines in the antitrust context, and is not a term of art." *SKW*, 195 F.3d at 90. Commentators have recognized the ambiguity of the key terms. *See, e.g.*, Mark A. Cohen & David T. Scheffman, The Antitrust Sentencing Guideline: Is the Punishment Worth the Costs?, 27 Am. Crim. L. Rev. 331, 349 (1989). Accordingly, there is no prospect that the circuits will work out this split on their own. Moreover, the Sentencing Commission has not undertaken to eliminate circuit conflict over the meaning of this key phrase.

Such a three-way split of authority would justify review of any issue, but the need for immediate review is particularly acute because the decision impacts individual liberty. Indeed, the current disarray among the circuits undermines the very uniformity that the Guidelines were designed to achieve. *See, e.g., Koon v. United States*, 518 U.S. 81, 113 (1996); *Burns v. United States*, 501 U.S. 129, 133 (1991); *Mistretta v. United States*, 488 U.S. 361, 366 (1989). This Court should put an end to this uncertainty by granting review and definitively settling the meaning of the Guidelines.

III. THE COURT BELOW ENGAGED IN BOTH EGREGIOUS APPELLATE FACT-FINDING AND RESENTENCING ON APPEAL THAT JUSTIFY SUMMARY REVERSAL OR THE EXERCISE OF THE COURT'S *CERTIORARI* JURISDICTION TO FOSTER SOUND JUDICIAL ADMINISTRATION AND ECONOMY

The Court of Appeals for the Seventh Circuit engaged in impermissible appellate fact finding and usurped the sentencing authority of the District Court in determining Andreas' role in the offense. Based upon an extensive review of the record, the District Court held that Andreas bore no greater culpability than his co-conspirators and, therefore, did not deserve a four point enhancement. The Sentencing Guidelines list seven factors to use in assessing relative responsibility, U.S.S.G. § 3B1.1, note 4, and the District Court fully discussed and considered these factors in its sentencing opinion. App. 80a-84a. Nonetheless, the Seventh Circuit panel decided that Andreas should receive a longer sentence and engaged in impermissible appellate fact-finding regarding Andreas' role in the offense, finding that Andreas was an organizer or leader subject to a four point sentence enhancement for his role in the offense.

In reviewing a District Court's sentencing decision, 18 U.S.C. § 3742(e) mandates that:

> The court of appeals shall ... accept the findings of fact of the District Court unless they are clearly erroneous and shall give due deference to the District Court's application of the guidelines to the facts.

This is the same "clearly erroneous" standard that applies in civil cases under Fed. R. Civ. P. 52(a). *See Maine v. Taylor*, 477 U.S. 131, 144-145 (1986); *see also Koon*, 518 U.S. at 97 (emphasizing the limited nature of appellate review of sentencing decisions).

This Court has previously admonished appellate courts that they are not entitled to "reverse the finding of the trier of fact simply because [the appellate court] is convinced that it would have decided the case differently." *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 573 (1985). A reviewing court "oversteps the bounds of its duty . . . if it undertakes to duplicate the role of the lower court." *Id.* Not only is such duplication unauthorized, but when an appellate court in effect conducts a resentencing and imposes a substantially harsher punishment, it creates a risk of imposing a chilling effect on the valid exercise of the statutory right of appeal. Moreover, there are—other important policy reasons for prohibiting appellate fact-finding. An individual should not be put to the time and expense of twice presenting his case. The function of the appellate court is not to provide litigants with a second opportunity to litigate the facts of the case. By engaging in such egregious appellate fact-finding, the Seventh Circuit is essentially inviting the government and defendants to relitigate the factual basis for the sentence at the appellate level.

It is well-settled that "[i]f the District Court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.* at 573-74; *Amadeo v. Zant*, 486 U.S. 214, 223 (1988). It is error for an appellate court to reverse the factual findings of a district court even if there is significant evidence in the record to support the findings of fact favored by the appellate court. *Amadeo*, 486 U.S. at 225-26. An appellate court's "function is not to decide factual issues de novo." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson*, 470 U.S. at 574.

The deference § 3742(e) requires to be accorded the factual findings of a district court extends not only to credibility determinations, but even to factual findings based on "physical or documentary evidence or inferences from other facts." *Id.* It is the district court, not the appellate court, that has experience in making factual determinations. *Id.* Moreover, the trial court "is usually in a superior position to appraise and weigh the evidence." *Zenith*, 395 U.S. at 123.

The Seventh Circuit's methodology conflicts with all these well-established precedents. By making de novo factual findings that "[three ADM employees] Marty Allison, Alfred Jansen, and John Ashley . . . helped to implement the pricing and volume allocation schemes;" that "Andreas control[led] the foreign co-conspirators at [a meeting that he attended];" that "Andreas was the ultimate leader of the price-fixing cabal;" and that "it was ADM that suggested the scheme, planned it, and carried it out," App. 61a-62a, the Seventh Circuit crossed the line into impermissible appellate fact finding and improperly substituted its judgment for that of the District Court. *See Amadeo*, 486 U.S. at 228. Although the Seventh Circuit may have reached a different conclusion, the District Court's finding that Andreas was not an organizer or leader subject to a four point enhancement was more than plausible given the evidence presented at trial and at sentencing.

The District Court attentively observed the evidence, including the tapes, documents, and the credibility of witnesses during the two month trial. It held a lengthy sentencing hearing, deliberated over the factual findings, and issued a 31 page opinion supporting its sentencing findings and conclusions. The District Court found as fact that no ADM sales executive other than Andreas (and defendants Wilson and Whitacre) was criminally responsible and that Andreas was no more culpable than his co-conspirators. *See* App. 80a-84a. Those factual findings were based on

substantial credible evidence. At the very least they were certainly plausible, notwithstanding the Seventh Circuit's contrary view. The District Court heard and observed hours of audio and videotapes, as well as the testimony of the foreign co-conspirators, and it properly drew inferences and made credibility determinations based upon its observations.

The Seventh Circuit rejected the District Court's fact-finding by focusing on two facts: its belief that ADM employees other than Andreas, Wilson, and Whitacre "helped to implement the pricing and volume allocation schemes," and its belief that Andreas controlled the foreign co-conspirators. App. 61a-63a. However, after careful consideration, the District Court had rejected both of those premises, which were fully briefed and argued at sentencing, based on its superior familiarity with the record. By reversing the District Court, not based on a legal error, but based on a different view of the facts, the Seventh Circuit violated the clear limits on appellate review. *Amadeo*, 486 U.S. at 223.

Ample evidence supported the District Court's sentencing determination. The District Court's finding "that none of the ADM sales executives knew, let alone participated in the conspiracy," App. 82a, is not only plausible, but consistent with the evidence. No evidence was presented at trial that Allison, Jansen, or Ashley participated in the conspiracy. Despite almost two and a half years of taping by Whitacre, who had virtually unfettered access to Andreas, Wilson, and other ADM employees, there is not a single tape evidencing the participation of Allison, Jansen, or Ashley in the conspiracy.

Moreover, the District Court had heard the government in closing argument describe Wilson and Andreas as the only ADM personnel other than Whitacre who participated in the alleged conspiracy. The prosecutor's precise words at trial were that:

> Only three people at ADM were given knowledge that they were engaging in price-fixing in lysine, and those three people are the three defendants in this case: Mr. Andreas, Mr. Wilson, and Mr. Whitacre. No one else was to be trusted with that knowledge. Even the salesmen weren't to be told about this, and that's something we saw many times. The foreign competitors wanted to meet with ADM salesmen to discuss the price-fixing, and ADM said: Absolutely not, you can't talk to the salesmen. The reason is they don't want to trust the salesmen with that information. The salesmen could go off to another company and then could turn in the top people and report that there's price-fixing.

Thus, the prosecutor argued, in order to obtain the guilty verdict, that no ADM personnel other than Andreas, Wilson, or Whitacre were involved in the conspiracy. Yet the fact-finding by the Seventh Circuit was so extreme that it based the sentence on the opposite conclusion.

To the extent Andreas' sentence was increased based on an appellate de novo finding of fact that is directly at odds with what the prosecutor told the jury, the appellate fact-finding violates the spirit of this Court's teaching in *Apprendi v. New Jersey*, 120 S. Ct. 2348, 2359 (2000), that a sentence should not "exceed[ ] the maximum [defendant] would receive if punished according to the facts reflected in the jury verdict alone." Here, though within the statutory maximum, the appellate fact-finding contrary to what the jury was told increased the sentence by 50 percent.

Whitacre and Andreas discussed Ashley, and that taped conversation supports the view that Andreas was attempting to ensure that Ashley would follow the law by instructing Whitacre to remind Ashley that employees at ADM would be fired if they broke the law. The District Court also heard a tape of a conversation where Whitacre told one of the co-conspirators that Ashley was not to be told about or involved with either a price or sales volume allocation agreement. The

District Court concluded that Ashley was not a participant. Andreas should not have had to convince the appellate panel of this as well.

Yet the Seventh Circuit based its reversal on drawing the opposite inferences. In taking that action, it ignored both the deference owed the District Court and the fact that an alternative plausible view of the evidence, such as the District Court reached, can never be clearly erroneous. *Anderson*, 470 U.S. at 574.

Evidence in the record also strongly supports the District Court's conclusion that the foreign co-conspirators were not controlled by Andreas. App. 81a-85a. It was Ajinomoto, not ADM, that had the largest market share and was the most powerful lysine manufacturer. An Ajinomoto document describes Ajinomoto as the "leader" in price-fixing. The foreign competitors had been a cartel engaged in illegal conduct before ADM even entered the market. The foreign competitors had engaged in territorial allocations long before ADM entered the market. One of the government's witnesses testified at trial that an Ajinomoto employee was the "grandfather" of price-fixing. Another government witness testified that the foreign competitors engaged in anti-competitive activity for a "long period of time" before ADM entered the market.

There was considerable evidence that the foreign co-conspirators were not led by Andreas, but by Ajinomoto officials. The government argued to the District Court that it was an Ajinomoto official who told Andreas on April 30, 1993, that a sales volume allocation agreement was necessary. It was an Ajinomoto official who suggested the establishment of a trade association, the vehicle the government claims was used to facilitate price-fixing and a sales volume allocation, and who suggested the Irvine, California meeting that was attended by Andreas. Moreover, it was an Ajinomoto employee who was the "quarterback" of

the conspiracy. It was Ajinomoto that led and coordinated the activities of the foreign competitors. The foreign competitors conducted numerous meetings without any ADM representative present, often taking these opportunities to conspire against ADM. All of this evidence supported the District Court's conclusion that Andreas did not lead the foreign co-conspirators.

Despite the dictates of the sentencing statute and the weight of credible evidence supporting the District Court's findings of fact in applying the guidelines on role in the offense, the Seventh Circuit decided that it would have sentenced Andreas differently and remanded this case ordering the District Court to give Andreas a particular sentence. In making impermissible, erroneous de novo findings of fact, the Seventh Circuit made numerous credibility determinations, and it substituted its inferences for those of the District Court, which had attentively observed the demeanor and tone of witnesses, reviewed the documents, and listened to more than forty audio and videotapes during this two month trial.

The Seventh Circuit's arrogation to itself of the authority to find facts justifies the exercise of this Court's *certiorari* jurisdiction. This Court has not hesitated to grant *certiorari* where appellate courts have disregarded the clearly erroneous standard. *See, e.g., Zenith,* 395 U.S. at 108 ("We granted *certiorari* . . . to consider among other things the question whether the Court of Appeals properly discharged its appellate function under Rule 52(a) . . . ."); *see also, e.g., Anderson,* 470 U.S. at 566 ("Because our reading of the record convinces us that the Court of Appeals misapprehended and misapplied the clearly-erroneous standard, we reverse."). In *Zenith,* this Court admonished that "appellate courts must constantly have in mind that their function is not to decide factual issues *de novo.*" 395 U.S. at 123. The court

below's assumption of fact-finding authority in this case shows that a reminder from this Court is appropriate.

CONCLUSION

For the foregoing reasons, this Court should grant this Petition.

Respectfully submitted,

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